

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ZEMENCO, INC.,
Plaintiff

v. CIVIL ACTION NO. 03-175 ERIE

DEVELOPERS DIVERSIFIED
REALTY CORPORATION,
Defendant

STATUS CONFERENCE

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Judge's Chambers, U.S. Courthouse, Erie,

Pennsylvania, on Thursday, June 2, 2005.

APPEARANCES:

VASILIOS NACOPOULOS, Esquire, (via Phone),
appearing on behalf of the Plaintiff.

ERIC P. REIF, Esquire, (via Phone), appearing on

W. PATRICK DELANEY, Esquire, (via Phone),
appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

2

1 PROCEEDINGS

2

3 (Whereupon, the proceedings began at 1:30 p.m., on
4 Thursday, June 2, 2005, in Judge's Chambers.)

5

6 THE COURT: Gentlemen, this is Judge McLaughlin, I
7 wanted to get you on the phone here to try to figure out where
8 this counsel situation is. And in no particular order of
9 importance, let's start with this question. My understanding
10 is that there had been some misunderstanding between Mr.
11 Nacopoulos and Mr. Reif concerning whether or not a lien was
12 being asserted on the file?

13 MR. NACOPOULOS: I have an update for you on that

14 subject, this is Attorney Bill Nacopoulos.

15 THE COURT: What is it?

16 MR. NACOPOULOS: My firm received four banker's
17 boxes of files from Attorney Reif's office the day before
18 yesterday and four more yesterday. Hopefully, Mr. Zafiropolous
19 here will be reviewing those boxes to insure that the complete
20 files have been provided. So, hopefully, that's the case and
21 that issue is moot.

22 MR. REIF: Judge, in this regard we have forwarded
23 the files. We kept copies of pleadings, correspondence and
24 that type of thing. But other than my personal notes, that
25 type of thing, the complete file has been provided. And with

1 regard to the lien issue, as indicated in my letter to the
2 court, we received a demand to release those files on May 19th.
3 I was on vacation at the time. We in fact informed Mr.
4 Nacopoulos we would not do that without the appropriate
5 authorizations. We in fact then received those authorizations.
6 In addition, we were getting conflicting messages, we were told
7 in the condemnation action they were going to object to our

8 motion to withdraw as counsel and, of course, we could not turn
9 over the files until we were granted leave to withdraw as
10 counsel. We were subsequently informed that there would be no
11 objection to our motion to withdraw in the condemnation, which
12 motion has now been filed. And the files were sent out last
13 Friday.

14 THE COURT: All right.

15 MR. NACOPOULOS: I don't want to belabor the point,
16 I think it's moot. Just to clarify, the only motion to
17 withdraw we had an opportunity to object to was in the
18 condemnation action, that was after the motion to withdraw was
19 already filed in your court.

20 THE COURT: That may very well be. Didn't you
21 indicate, Mr. Reif, you had forwarded a copy of the motion to
22 your client on May 4th?

23 MR. REIF: The time line, your Honor, is this. On
24 April 21, 2005 -- I'm happy to provide the court with copies of
25 the documents.

1 THE COURT: I don't need that.

2 MR. REIF: I wrote to Mr. Zafiropolous and informed
3 him at that time that our firm would be filing a motion for
4 leave to withdraw in May. On May 4th I faxed both of our
5 motions, the motion for leave to withdraw and the motion asking
6 that the date for the filing of the pretrial statements be
7 moved back, both to Mr. Nacopoulos and I e-mailed that to Mr.
8 Zafiropolous. Moreover, I spoke with Mr. Zafiropolous that day
9 and told him that it would be presented, or that it would be
10 filed. His remark was, well, if you can wait until 2 o'clock,
11 we may have other counsel. But that is up to you. I said no,
12 we're going to go forward with the filing of these motions. On
13 May 9th I faxed the letter to both Mr. Nacopoulos and Mr.
14 Zafiropolous informing them that the motions had been granted.
15 On May 10th I faxed them copies of the orders. On May 17th Mr.
16 Nacopoulos, again while I was on vacation, sent a letter asking
17 our firm to file a pleading with the court asking that
18 additional time be granted for them to locate substitute
19 counsel. I informed Mr. Nacopoulos that we were no longer
20 counsel, that we were not prepared to undertake that, that he
21 should do it or have other counsel do it. Then on May 19th we
22 received a demand to release the files. But that is the time
23 line, your Honor.

24 THE COURT: All right, that's helpful. Now, let's
25 start to zero in on the big question here. And the question

5

1 is, Mr. Nacopoulos, have you and/or your client, have you been
2 successful in locating new permanent counsel on this case?

3 MR. NACOPOULOS: Not quite yet. We're in the middle
4 of negotiating with an attorney from Meyer, Unkovic. We have
5 not finalized our engagement with them. And they were
6 interested in participating in this conversation, however, they
7 felt at the last minute this morning that because they have not
8 finalized the engagement, they didn't want to participate in
9 this conference call.

10 THE COURT: I don't think that's unreasonable.

11 MR. NACOPOULOS: So we were very close. Also, with
12 the firm of Blumling & Gusky, however, they backed out of the
13 representation as well. I might add that was after discussing
14 the case with Attorney Reif.

15 THE COURT: All right.

16 MR. NACOPOULOS: I also wanted to add, judge, if
17 you'll permit me, that I received the motion, copies of the

18 motion to withdraw under Attorney Reif's letterhead, which
19 specifically stated that they were already filed. So neither
20 Andy Zafiropolous or myself had any input or were able to
21 review those motions before they were filed. We were also
22 given no copies of any correspondence regarding those motions.

23 THE COURT: Let me ask kind of a practical question
24 then. Assuming that you didn't get adequate, if any, advanced
25 notice sufficient for you to object, are you telling me post

6

1 hoc, are you asking me now to reconsider my previous order
2 releasing him from the case?

3 MR. NACOPOULOS: No, judge, because Andy
4 Zafiropolous and Zemenco have no confidence whatsoever in Mr.
5 Reif continuing to represent their interests.

6 THE COURT: Well, then, whether you got notice or
7 didn't get notice is a moot point because you're not moving --

8 MR. REIF: Yes, your Honor, they had notice.

9 THE COURT: I don't want to go down that road
10 anymore. That order is in, I'm not going to change it, it is
11 what it is. Let me make a couple observations. This is an old

12 case. And I'm always sympathetic with, generally sympathetic
13 with clients who are trying to obtain counsel, particularly in
14 situations where there has been a parting of the ways. Which,
15 by the way, one of the reasons that were represented by Mr.
16 Reif and his firm is they weren't being paid. Which is one of
17 the reasons that I often, among others, will grant a motion to
18 withdraw. But that being said, the ball is in your court, you
19 now apparently have contacted two or three attorneys, the first
20 two I guess weren't interested in taking the case after looking
21 at it. You have another one who is mulling it over, and I do
22 not want to know or nor would it be appropriate for me to know
23 the whys and wherefores of the difficulty of landing new
24 counsel here. But it's enough for me to say this. That the
25 problem ultimately is yours, Mr. Nacopoulos. And I do not want

7

1 this case inordinately delayed while you try to get counsel.

2 MR. NACOPOULOS: I agree, your Honor. In fact, at
3 the very moment that we realized Attorney Reif was not going to
4 adequately represent Zemenco's interest, we immediately
5 contacted people that we knew to get references and we

6 immediately set up meetings with Attorney Blumling and others.

7 We were very diligent in that regard.

8 THE COURT: What did you want to say, Mr. Reif?

9 MR. REIF: I just wanted to say with regard to this,

10 it doesn't even merit a response, the adequate representation,

11 your Honor is familiar with the case much more so than Mr.

12 Nacopoulos.

13 THE COURT: I am.

14 MR. REIF: And your Honor is aware of the work and

15 the expense of discovery that has gone into it.

16 THE COURT: I am.

17 MR. REIF: We have devoted a lot of time and expense

18 to it, advancing the interests of this file. For that matter,

19 they have all the discovery, they have briefs filed in

20 connection with the motions for summary judgment. They have

21 appendices, it would seem to me that gives them a substantial

22 leg up. With regard to adequate representation, if the idea is

23 we are to continue this representation indefinitely without

24 being paid and without the ability to retain and keep experts,

25 then I guess we have different views.

1 MR. NACOPOULOS: That's absolutely not our
2 intention. The critical fact, your Honor, is that we be able
3 to be involved in forming our ability or inability to retain
4 new counsel. We would ask that at this point you don't forget
5 that you granted two motions. There was a motion to withdraw
6 and a motion to amend the case management order. We would have
7 requested much more time in order to find counsel and have that
8 counsel inform the court of the timing that it needed to get up
9 to speed on the case. I don't think it's reasonable to expect
10 a new attorney to come in and in 30 days get up to speed on a
11 case, which is eight file boxes big, is just inconceivable.

12 THE COURT: It's a big case.

13 MR. NACOPOULOS: It's a big case and Attorney Reif
14 might be very conversant with it and your Honor might be very
15 conversant with the case, but a new attorney would first want
16 to evaluate the case and then get conversant with the case.

17 THE COURT: The reason we're here today, Mr.
18 Nacopoulos, is because of your client. Let me remind you
19 that's why we're here, because there has been a falling out on
20 your client's part with his former lawyer and he apparently is

21 having difficulty getting a new one. All right, now I'm going

22 to move to scheduling matters. This case will be set for

23 argument on what date, Becky?

24 THE CLERK: June 17th.

25 THE COURT: And you now find yourself in the

9

1 position where if you don't have new counsel on board, and let

2 alone someone who has gone through the file and would be in a

3 position to argue this thing. My view of it is this. Both

4 briefs are filed. This is not going to require someone to go

5 through the entire file with a fine tooth comb. It is going to

6 require competent counsel to come up to speed on the legal and

7 factual issues that are driving the motion for summary

8 judgment. Number one. I do not think that's an endless period

9 of time. In order to make sure of an even playing field here,

10 I'm inclined to move that argument date. But I'm not going to

11 have a floating date that just goes on interminably. I am

12 going to give you 30 days from today within which to obtain --

13 let me actually grab my calendar, I want to look at the

14 calendar before I say anything.

15 MR. DELANEY: Judge, this is Pat Delaney.

16 THE COURT: Do you have anything to say?

17 MR. DELANEY: Other than I'm anxious to get the case
18 prepared and at least argued.

19 THE COURT: Refresh my recollection because I have
20 about 15 cases on my desk here with motions to dismiss and
21 motions for summary judgment and they tend to run together.

22 What are the driving issues that push this summary judgment?

23 MR. DELANEY: If you remember we had, I don't have
24 the summary judgment brief in front of me, but we had the issue
25 of petitioning immunity --

10

1 THE COURT: First Amendment.

2 MR. DELANEY: We have the issue that all of the
3 plaintiff's damages arise from a condemnation action. And we
4 have a statute of limitations issue on any other, not any other
5 cause of action. What I was going to say, you're correct,
6 these issues were argued once.

7 THE COURT: These are pure questions of law.

8 MR. DELANEY: Pretty much. They were argued once, I

9 was going to let counsel know that I have a transcript of Mr.

10 Reif's argument in the first argument, I'll share with

11 Zemenco's counsel, I don't think that is part of the record

12 anywhere, I'm not sure. Then we took just one additional

13 deposition and came back and renewed the motions for summary

14 judgment. It really is almost an appellate sort of argument.

15 Discovery is closed, so there's a record. There are deposition

16 transcripts, there are appendices that have been filed. And

17 it's something that might take a couple of weeks to get up to

18 speed once you're settled in. But the point I was going to

19 raise is one month from today is a Saturday, the July 4th

20 weekend.

21 THE COURT: Forget about that, I now have my

22 calendar in my hand.

23 MR. DELANEY: July 4th is a Monday and July 2nd is a

24 Saturday.

25 THE COURT: One second, if you could bear with me.

1 When did I grant the motion to withdraw, what was the date of

2 that?

3 MR. NACOPOULOS: I believe May 5th or May 9th.

4 MR. REIF: May 9th, your Honor.

5 THE COURT: All right. This is what I'm going to

6 do. This case is going to be set, I'm going to push it far

7 enough out to get new counsel and permit new counsel to get up

8 to speed. This case is set for argument on July 29th at 9 a.m.

9 in my courtroom. And let me add that the argument is going to

10 take place regardless of the status of counsel at that time.

11 And I put it out far enough under the presumption you're going

12 to be able to get counsel. All right, what's going on with the

13 condemnation case?

14 MR. DELANEY: My understanding is that Tim Sennett,

15 who represents Summit Township in that action, there was a

16 hearing scheduled for I think May and it was postponed because

17 Zemenco did not file an expert report, valuation report. And

18 that the hearing, my last information was the hearing is

19 indefinitely postponed. I bring that to your attention, you

20 may remember that if Zemenco prevails in this condemnation

21 case, if they get more than \$287,000, they got initially from

22 the condemnation action, my client ends up paying that under an

23 indemnity agreement. So that condemnation action has a

24 significant impact on the damage claim in this case.

25 MR. REIF: The only thing I wanted to say, Mr.

12

1 Delaney is with regard to the status of the condemnation. Mr.
2 Sennett filed a motion to continue that, to continue that Board
3 of View hearing which had been established indefinitely because
4 we were coming up on that hearing date, and we were not able to
5 furnish him with an expert's report.

6 THE COURT: That has not even been rescheduled, is
7 that right?

8 MR. REIF: That is correct.

9 THE COURT: Mr. Nacopoulos, are you looking -- I
10 presume you're looking for new counsel in the condemnation
11 matter as well?

12 MR. NACOPOULOS: That's correct, your Honor.

13 THE COURT: All right, counsel, I think that's as
14 much as I need to do today. I simply wish you good luck in
15 obtaining your new counsel, I presume you're going to be able
16 to do that.

17 MR. NACOPOULOS: Will new counsel have an
18 opportunity to discuss with you the remaining deadlines, such

19 as pretrial statements?

20 THE COURT: I'm not going to do anything on that
21 today in anticipation of someone else coming on board. It's
22 sufficient for my purposes today to push the argument date out
23 far enough and then either probably at that argument I'll take
24 up the issue anew. But I will say this, and you can relay this
25 to new counsel when they get on board. Obviously, one of two

13

1 things are going to happen here. Either the motion is going to
2 be denied or the motion is going to be granted. And given the
3 age of this case, I do not like to have three-year-old cases on
4 my docket, this is quickly aging into that, I'm going to move
5 on that motion very expeditiously. If it's granted, well then
6 it's granted. If it's denied, it would be my intention to get
7 this case tried with great expedition, at least started
8 sometime during my late fall term of court. But that's an
9 issue that can await new counsel. All right, thank you.

10

11 (Whereupon, at 1:50 p.m., the proceedings were
12 concluded.)

13

14

- - -

15

16

17

18

19

20

21

22

23

24

25

14

1 C E R T I F I C A T E

2

3

4 I, Ronald J. Bench, certify that the foregoing is a

5 correct transcript from the record of proceedings in the

6 above-entitled matter.

7

8

9

10 _____

11 Ronald J. Bench

12

13

14

15

16

17

18

19

20

21

22

23

24

25